

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

AHCOM, LTD.,)	
)	
Plaintiff,)	No. C-07-1139 SC
)	
v.)	
)	ORDER GRANTING
HENDRICK SMEDING, LETTIE SMEDING)	DEFENDANTS' MOTION TO
and DOES 1-15, inclusive,)	<u>DISMISS</u>
)	
Defendants.)	
)	
_____)	

I. INTRODUCTION

Plaintiff Ahcom, Ltd., ("Ahcom") brought this suit in the Napa County Superior Court, alleging that Defendants Hendrik and Lettie Smeding ("Defendants" or "Smedings") are the alter egos of Nuttery Farms, Inc. ("NFI"), and asking the Court to confirm and enforce the award issued in an arbitration between Plaintiff and NFI. See Notice of Removal, Docket No. 1, Ex. A ("Compl."). Defendants timely removed the suit to this Court under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, codified in chapter 2 of the Federal Arbitration Act, 9 U.S.C. § 201, et seq. See Notice of Removal.

Now before the Court is Defendants' motion to dismiss ("MTD"). Docket No. 87. The Plaintiff opposes the MTD, and alternatively requests that it be permitted to amend its

1 complaint. Docket No. 88. Defendants have submitted a reply.
2 Docket No. 90. Having considered the parties' submissions, the
3 Court GRANTS Defendants' MTD.

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5 **II. BACKGROUND**

6 The Court has already discussed the factual history of this
7 dispute in its order denying cross-motions for summary judgment.
8 Docket No. 38. The facts most relevant to the motion before the
9 Court are as follows. Defendants were the sole shareholders,
10 officers, and directors of NFI. Compl. at 2. NFI filed a
11 voluntary petition for bankruptcy on July 5, 2006. Request for
12 Judicial Notice ("RJN"), Ex. 1. Docket No. 35.¹

13 On February 26, 2007, Plaintiff filed suit against
14 Defendants, alleging that NFI and Plaintiff had entered contracts
15 for the sale of almonds. Compl. at 3. NFI allegedly did not
16 fulfill these contracts, and Plaintiff previously sought and
17 received an Arbitration Award against NFI from a German trade
18 association, Waren-Verein der Hamburger Börse e.V. Id. at 3-4.
19 However, NFI is not a party to the present suit. Instead,
20 Plaintiff alleges that Defendants and NFI had "a unity of interest
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22 ¹ Defendants submitted a request for judicial notice in
23 support of their motion to dismiss. The request includes filings
24 and a claims register from NFI's bankruptcy proceedings. The Court
25 may take judicial notice of filings in other courts. See United
26 States ex rel. Robinson Rancheria Citizens Council v. Borneo, Inc.,
27 971 F.2d 244, 248 (9th Cir. 1992). The request also includes a
28 certificate of incorporation filed with the California Secretary of
State. RJN, Ex. 3. District Courts routinely take judicial notice
of certificates of incorporation. See, e.g., Shurkin v. Golden
State Vintners, Inc., No. 04-3434, 2005 U.S. Dist. LEXIS 39301, at
*19 (N.D. Cal. Aug. 10, 2005). The Court GRANTS defendants'
request for judicial notice.

1 in ownership" and commingled their funds, and that Defendants
2 diverted funds, treated assets of NFI as their own, and failed to
3 adequately capitalize NFI. Id. at 2-3. On this basis, Plaintiff
4 asserts that Defendants are the alter ego of NFI and seeks to
5 enforce the arbitration award against them. Id.

6 Defendants now contend that the claims against them cannot go
7 forward because Plaintiff's standing is premised upon an alter ego
8 theory. MTD at 3. Defendants claim that this theory is based on
9 generalized misconduct and harm done to the corporation, and as
10 such, it can only be brought by the bankruptcy trustee. Id.

11 12 **III. LEGAL STANDARD**

13 Pursuant to Federal Rule of Civil Procedure 12(b)(6), the
14 Court will grant a motion to dismiss if a plaintiff fails "to
15 state a claim upon which relief can be granted." Fed. R. Civ. P.
16 12(b)(6). When evaluating a motion to dismiss, the Court accepts
17 the facts as stated by the nonmoving party and draws all
18 reasonable inferences in its favor. See Everest & Jennings, Inc.
19 v. Am. Motorists Ins. Co., 23 F.3d 226, 228 (9th Cir. 1994). At
20 this stage, a plaintiff "need only show that the facts alleged, if
21 proved, would confer standing upon him." Warren v. Fox Family
22 Worldwide, Inc., 328 F.3d 1136, 1140 (9th Cir. 2003).

23 24 **IV. DISCUSSION**

25 After a corporation has filed for bankruptcy, only the
26 Chapter 7 bankruptcy trustee has standing to collect the property
27 of the estate. 11 U.S.C. § 704(a)(1). This includes "all legal
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1 or equitable interests of the debtor in property as of the
2 commencement of the case," and all causes of action that the
3 debtor might have. 11 U.S.C. § 541(a)(1); United States v.
4 Whiting Pools, Inc., 462 U.S. 198, 205 n.9 (1983). Defendants
5 contend that only NFI's bankruptcy trustee can bring alter ego-
6 based claims against them. MTD at 3-4. The question of whether a
7 particular cause of action is the property of a debtor is a
8 question of state law. In re Folks, 211 B.R. 378, 384 (B.A.P. 9th
9 Cir. 1997). Because NFI is located and incorporated in
10 California, RJN, Ex. 3, this Court applies California law.

11 Defendants rely on Folks, which stated that California law
12 recognizes two kinds of alter ego claims: one in which the injury
13 is to the corporation, and one in which the cause of action
14 belongs to a creditor individually. Id. at 385 (citing In re
15 Davey Roofing, Inc., 167 B.R. 604, 608 (Bankr. C.D. Cal. 1994);
16 Stodd v. Goldberger, 73 Cal. App. 33 827, 833 (App. Ct. 1977)).
17 "In California, only a creditor with a particularized injury has
18 standing to assert an alter ego claim." Id. Absent a unique
19 injury arising from the same facts that are used to pierce the
20 veil, facts giving rise to an alter ego theory could be used by
21 any creditor to bring a claim for repayment against the debtor's
22 shareholders. Id. at 387. Giving the trustee exclusive standing
23 to bring this claim therefore "promotes equitable distribution and
24 accords the Bankruptcy Code's ultimate goal of balancing the
25 equities and interests of all affected parties in a bankruptcy
26 case." Id. at 386.

27 This Court finds that the Plaintiff has set out a general
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1 alter ego claim, with no injury specific to Plaintiff. If the
2 Plaintiff's allegations are correct, then Defendants could be
3 liable for all of NFI's debts, rather than only the debt to Ahcom.
4 Plaintiff has pointed to no unique injury that has arisen from
5 Defendants' alleged malfeasance. It is of no consequence that
6 Ahcom seeks a determination that Defendants are the alter ego of
7 NFI only for the purpose of Ahcom's contract claim. The holding
8 in Folks applies whenever a general alter ego theory is used as
9 the basis for liability for a distinct cause of action, even if
10 that separate cause of action involves unique harm. See Eddleman
11 v. Thomas, No. 07-207, 2007 U.S. Dist. LEXIS 81185, at *3-4 (D.
12 Nev. Oct. 12, 2007) (applying Folks to claim involving breach of
13 lease and unjust enrichment coupled with alter ego theory);
14 Carramerica Realty Corp. v. NVIDIA Corp., No. 05-00428, 2006 U.S.
15 Dist. LEXIS 75399, at *8-11 (N.D. Cal. Sept. 29 2006) (applying
16 Folks to claim of intentional interference with contractual
17 relations). Ahcom's alter ego claim is available only to the
18 NFI's trustee. See Folks, 311 B.R. at 387.

19 Plaintiff contends that Folks relies on a single California
20 case, Stodd, 73 Cal. App. 3d 827, which it misreads to conclude
21 that California law allows a company to pierce its own veil.
22 Opp'n at 2. Plaintiff suggests that, under California law, the
23 corporate veil is pierced primarily to protect the rights of third
24 parties. Id.; See also Katzir's Floor and Home Design, Inc. v. M-
25 MLS.Com, 394 F.3d 1143 (9th Cir. 2004); Kohn v. Kohn, 95 Cal. App.
26 2d 708, 720 (Ct. App. 1950). If the veil can only be pierced for
27 third parties, then the alter ego claim that Ahcom is raising

1 could never be brought by NFI's trustee. However, this Court is
2 bound by Folks, and cannot find that California law disallows an
3 alter ego claim brought by NFI's bankruptcy estate. The Ninth
4 Circuit's "interpretation of [California] law remains binding in
5 the Ninth Circuit in the absence of any subsequent indication from
6 the [California] courts that [their] interpretation was
7 incorrect." Kona Enters., Inc. v. Estate of Bishop, 229 F.3d 877,
8 884 n.7 (9th Cir. 2000) (quotation omitted); see also F.D.I.C. v.
9 Abraham, 137 F.3d 264, 268-69 (5th Cir. 1998) (interpretation of
10 state law by federal appellate panel is binding on federal courts
11 in circuit).

12 Plaintiff has requested leave to amend its complaint. Opp'n
13 at 10-11. Plaintiff has proceeded through discovery, cross
14 motions for summary judgment, and nearly to trial on a theory of
15 general alter ego liability. The deadline for pretrial motions
16 expired on December 5. See Status Conference Order at 1. Docket
17 No. 45. Plaintiff must therefore show "good cause" to amend. See
18 Fed. R. Civ. P. 16(b); Johnson v. Mammoth Recreations, Inc., 975
19 F.2d 604, 608 (9th Cir. 1992). In its request, Plaintiff did not
20 show good cause, and pointed to no fact that may support its alter
21 ego theory and show unique harm that is distinct from harm to all
22 of NFI's creditors. This Court therefore DENIES Plaintiff's
23 request for leave to amend.

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